88-1329

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

In Re

PEDRO DELGADO, ELIA GREGORIO, MARCELO LLANES and MARTA R. TORRES,

Petitioners.

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, AND THE HONORABLE JAMES KEHOE, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

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QUESTIONS PRESENTED FOR REVIEW

1. Is there a clear and indisputable right to adjudication by a three-judge district court of a claim brought under section 203 of the Voting Rights Act?

2. Does the refusal of a single district judge to convene a required three-judge court and his denial on the merits of a claim required to be heard by a three-judge court preclude a United States Court of Appeals from affirming the decision of the district court on the merits?

PARTIES TO THE PROCEEDING BELOW

Pedro Delgado

Elia Gregorio

Marcelo Llanes

Marta R. Torres

Jim Smith, in his official capacity as Secretary of State of the State of Florida

David Leahy, in his official capacity as the Supervisor of Elections of Dade County, Florida, and as a representative of a defendant class of all County Supervisors of Elections in the State of Florida

Florida English Campaign

U.S. English Legislative Task Force, Inc.

U.S. English Foundation, Inc.

TABLE OF CONTENTS

Table of Authorities v
The Opinions in the Courts Below 1
Jurisdiction 1
Statutes at Issue 2
Statement of the Case 3
Reasons for Granting the Writ 8

I. The Petitioners Have a Clear and Indisputable Right to Have a Three-Judge Court Adjudicate Their Claim 9
II. Mandamus is the Exclusive Remedy Available to the Petitioners 13
III. Exceptional Circumstances Warrant the Exercise of this Court's Discretionary Powers 22

Conclusion 24

Appendix (Separate Cover)

Opinion of the United States Court of Appeals for the Eleventh Circuit, No. 88-6068 (Nov. 4, 1988) A1
Order Denying Application for Three-Judge Panel, No. 88-1880-CIV-KEHOE (S.D. Fla. Oct. 18, 1988) A31
Order Granting Leave to Intervene, No. 88-1880-CIV-KEHOE (S.D. Fla. Oct. 18, 1988) A33
Final Memorandum Decision, No. 88-1880-CIV-KEHOE (S.D. Fla. Oct. 24, 1988) A35
Final Judgment Denying Declaratory and Injunctive Relief, No. 88-1880-CIV-KEHOE (S.D. Fla. Oct. 24, 1988) A42

Judgment of the United States Court of Appeals for the Eleventh Circuit, No. 88-6068 (entered Nov. 4, 1988) A43

Order Denying Petition(s) for Rehearing and Suggestion(s) of Rehearing In Banc, No. 88-6068 (11th Cir. Dec. 19, 1988) A45

Plaintiffs' Application for Three-Judge Court, filed in No. 88-1880-CIV-KEHOE (S.D. Fla.) (Oct. 17, 1988) A47

Memorandum of Law in Support of Plaintiffs' Application for Three-Judge Court, filed in No. 88-1880-CIV-KEHOE (S.D. Fla.) (Oct. 17, 1988) A50

TABLE OF AUTHORITIES

Cases

Aaron v. Cooper, 261 F.2d 97 (8th Cir. 1958) 16
Alexander v. Fioto, 430 U.S. 634 (1977) 12
Allen v. State Bd. of Elections, 393 U.S. 544 (1969) 9, 10, 11
Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) 8-9, 12, 13
Ammex Warehouse Co. v. Department of Alcoholic Beverage Control, 224 F. Supp. 546 (S.D. Cal. 1963), *aff'd*, 378 U.S. 124 (1964) 16
Arizona v. California, 460 U.S. 605 (1983) 13
Bailey v. Patterson, 369 U.S. 31 (1962) 14
Bell v. Waterfront Comm'n of New York Harbor, 279 F.2d 853 (2d Cir. 1960) 14
Bender v. Williamsport Area School Dist., 475 U.S. 534, 106 S.Ct. 1326 (1986) 20
Brotherhood of Locomotive Engineers v. Chicago, R.I. & P. R.R., 382 U.S. 423 (1966) 12
Calloway v. Briggs, 443 F.2d 296 (6th Cir. 1971) 16
City of Rome v. United States, 472 F. Supp. 221 (D.D.C. 1979), *aff'd*, 446 U.S. 156 (1980) 12
Clayton v. North Carolina State Bd. of Elections, 317 F. Supp. 915 (E.D.N.C. 1970) 12
Delgado v. Smith, 861 F.2d 1489 (11th Cir. 1988) 1
Delgado v. Smith, No. 88-1880-CIV-JWK (S.D. Fla. Oct. 24, 1988), *aff'd*, 861 F.2d 1489 (11th Cir. 1988) 1
Ex parte Atlantic C. R.R., 279 U.S. 822 (1929) 14
Ex parte Bransford, 310 U.S. 354 (1940) 14
Ex parte Cogdell, 342 U.S. 163 (1951) 7

Ex parte Fahey, 332 U.S. 258 (1947) 9
Ex parte Northern P. Ry., 280 U.S. 142 (1929) 14
Ex parte Poresky, 290 U.S. 30 (1933) 14
German v. South Carolina State Ports Auth., 295 F.2d 491 (4th Cir. 1961) 15
Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974) 20
Goosby v. Osser, 409 U.S. 512 (1973) 14
Hagans v. Lavine, 415 U.S. 528 (1974) 12, 13
Hicks v. Pleasure House, Inc., 404 U.S. 1 (1971) 19, 20
Idlewild Bon Voyage Liquor Corp. v. Rohan, 289 F.2d 426 (2d Cir. 1961), remanded, 370 U.S. 713 (1962) 17, 19, 21
Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962) 1, 15, 16, 17, 18, 20
Kerr v. United States Dist. Court, 426 U.S. 394 (1976) 9, 12, 13
Lion Mfg. Corp. v. Kennedy, 330 F.2d 833 (D.C. Cir. (1964) 16
McLucas v. De Champlain, 421 U.S. 21 (1975) 18, 19, 20
Mengelkoch v. Industrial Welfare Comm'n, 393 U.S. 83 (1968) 20
Philbrook v. Glodgett, 421 U.S. 707 (1975) 13
Schackman v. Arnebergh, 387 U.S. 427 (1967) 20
Schneider v. Rusk, 372 U.S 224 (1963) 14, 21
Stamler v. Willis, 371 F.2d 413 (7th Cir. 1966) 16
Stratton v. St. Louis S.W. Ry., 282 U.S. 10 (1930) 1, 8, 14, 15, 17, 18, 19, 20, 21
Washington v. Confederated Tribes, 447 U.S. 134 (1980) 14
Will v. United States, 389 U.S. 90 (1967) 9

Wilson v. City of Port Lavaca, 391 U.S. 352 (1968) 20
Zemel v. Rusk, 381 U.S. 1 (1965) 12

Constitutional Provisions

Fla. Const. art. XI, § 3 4

Statutes

28 U.S.C.A. § 1291 (West 1966 & Supp. 1988) 6, 24
28 U.S.C.A. § 1294 (West 1966 & Supp. 1988) 6
28 U.S.C.A. § 1651 (West 1966) 1
28 U.S.C.A. § 2281 (repealed 1976) 14, 16
28 U.S.C.A. § 2284 (West 1978 & Supp. 1988) 6, 7, 14, 16
42 U.S.C.A. §§ 1971-1973bb (West 1981 & Supp. 1988) 3-4
42 U.S.C.A. § 1973c (West 1981) 10, 11
42 U.S.C.A. § 1973j(d) (West 1981) 11
42 U.S.C.A. § 1973aa-1a (West 1981 & Supp. 1988) ..... passim
42 U.S.C.A. § 1973aa-2 (West 1981) 3, 6, 7, 9
42 U.S.C.A. § 1973b(f)(4) (West 1981 & Supp. 1988) ..... passim
Fla. Stat., Chapters 97-106 (1987) 4

Rules

53 Fed. Reg. 735 (1988) 5
Fla. Admin. Code Chapter 1C-7 (1988) 4
Sup. Ct. R. 26 ..... 8, 21

Legislative History

S. Rep. No. 295, 94th Cong., 1st Sess., *reprinted in* 1975 U.S. Code Cong. & Admin. News 774 10
H.R. Rep. No. 196, 94th Cong., 1st Sess. 32 (1975) 10

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Hodgkiss, *Petitioning and the Empowerment Theory of Practice*, 96 Yale L.J. 569 (1987) 23

Note, *"Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 Harv. L. Rev. 1345 (1987) 22, 23

Note, *The Three-Judge District Court: Scope and Procedure Under Section 2281*, 77 Harv. L. Rev. 299 (1963) 20

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THE OPINIONS IN THE COURTS BELOW

The opinion rendered by the United States Court of Appeals for the Eleventh Circuit is *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988). The opinion affirms *Delgado v. Smith*, No. 88-1880-CIV-JWK (S.D. Fla. Oct. 24, 1988).

Both opinions are printed in the separately bound appendix accompanying this petition. References to materials contained in the appendix are made by the notation "(A)." The opinion of the court of appeals appears at A1, and the opinion of the district court appears at A35.

JURISDICTION

(i) *Date and Time of Judgment Below.* The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on November 4, 1988. (A43). The judgment of the court of appeals affirms the judgment of the United States District Court, Southern District of Florida, entered on October 24, 1988. (A42). By order entered on October 18, 1988, the district court denied the petitioners' application for a three-judge panel. (A31).

(ii) *Denial of Rehearing.* The court of appeals denied rehearing on December 19, 1988. (A45).

(iii) *Statutory Basis for Jurisdiction.* The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1651 (West 1966) and the authority of this Court's decisions in *Stratton v. St. Louis Southwestern Railway Co.*, 282 U.S. 10 (1930) and *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962).

STATUTES AT ISSUE

Section 4(f)(4), Voting Rights Act, 42 U.S.C.A. § 1973b(f)(4):

> Whenever any State or political subdivision subject to the prohibitions of the second sentence of subsection (a) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

Section 203(c), Voting Rights Act, 42 U.S.C.A. § 1973aa-1a(c):

> Whenever any State or political subdivision subject to the prohibition of subsection (b) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

Section 204, Voting Rights Act, 42 U.S.C.A. § 1973 aa-2:

> Whenever the Attorney General has reason to believe that a State or political subdivision (a) has enacted or is seeking to administer any test or device as a prerequisite to voting in violation of the prohibition contained in section 1973aa of this title, or (b) undertakes to deny the right to vote in any election in violation of section 1973aa-1 or 1973aa-1a of this title, he may institute for the United States, or in the name of the United States, an action in a district court of the United States, in accordance with sections 1391 through 1393 of Title 28, for a restraining order, a preliminary or permanent injunction, or such other order as he deems appropriate. An action under this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall be to the Supreme Court.

STATEMENT OF THE CASE

This petition for writ of mandamus arises in a case involving an initiative to amend the Florida constitution to declare English the state's official language.[1] At issue in the underlying action is whether, in view of the language minority provisions of the Voting Rights Act of 1965, 42 U.S.C.A. §§ 1971-1973bb-1 (West 1981 & Supp.

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1. Simultaneous with the filing of this petition for writ of mandamus, the petitioners filed a petition for writ of certiorari to review a decision of the United States Court of Appeals for the Eleventh Circuit in the case giving rise to this petition. The reasons that both mandamus and certiorari have been sought and should be issued are discussed in the argument *infra*.

1988) ("Voting Rights Act" or "Act"), it was permissible to conduct this initiative (the "Official English Initiative") using a petition written only in English. At issue in this petition for writ of mandamus is whether a United States Court of Appeals has jurisdiction to affirm a single district judge's denial on the merits of a claim that is required to be heard by a three-judge court.

Florida citizens who desire to amend their state constitution may initiate and circulate a petition in support of the proposed amendment. If enough valid signatures are collected, and if they meet requirements of geographic distribution, the amendment may be placed on the ballot and put to Florida's electors for their consideration. Fla. Const. art. XI, § 3.

The Florida Election Code, Fla. Stat., Chapters 97-106 (1987), and the Florida Administrative Code, Fla. Admin. Code Chapter 1C-7 (1988), prescribe in detail the manner in which a petition initiative must be conducted. These provisions delineate the form that a petition must take, and require that the petition be approved by the Florida Secretary of State before it is circulated. They also specify procedures and standards for submission of signed petitions to the Secretary for certification and ballot positioning.

In accordance with these statutes and rules, the proponents of the Official English Initiative in 1984 obtained the approval of the Secretary of State to circulate a petition on the Initiative. The petition approved by the Secretary was written exclusively in English. In August, 1988, the Secretary certified that the sponsors had collected enough valid signatures for the measure to be placed on the ballot.

Of the 366,555 signatures that the Secretary certified as valid, 63,558 were obtained from electors in six Florida counties that are covered by the language minority provisions of the Voting Rights Act. In such counties, whenever the state provides any materials related to the electoral process, it must provide them in the language of the applicable minority group—here, Spanish. Section 4(f)(4), Voting Rights Act, 42 U.S.C.A. § 1973b(f)(4) (West 1981 & Supp. 1988); Section 203(c), Voting Rights Act, 42 U.S.C.A. § 1973aa-1a(c) (West 1981 & Supp. 1988).[2]

The petitioners filed a pre-election complaint on October 11, 1988, seeking declaratory and emergency injunctive relief. The complaint alleged that two sections of the Voting Rights Act—sections 203 and 4(f)(4)—had been violated because the Official English petitions improperly had been provided only in English in the six Florida counties covered by the language minority provisions of the Act. The complaint further alleged that the Official English Initiative should not have been certified to be put on the ballot for a vote in the upcoming election because the signatures on the improper petitions should not have been counted. Without those signatures, the Initiative would not be supported by the 342,939 signatures required by state law to place the measure on

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2. Both sections 203 and 4(f)(4) mandate that, whenever a state provides "materials or information relating to the electoral process," it must provide them in the language of the applicable minority group as well as in English. Five of the six Florida counties covered by the language minority provisions of the Act are covered by section 4(f)(4). One of the counties covered under section 4(f)(4) is also covered under section 203. The sixth covered county (Dade County), is covered only by section 203. *See* 53 Fed. Reg. 735, 736 (1988) (identifying Florida's six bilingual counties and designating their coverage under section 203 or 4(f)(4)).

the general election ballot.[3] Simultaneously with the filing of the complaint, the petitioners moved for a preliminary injunction against any votes being cast or counted with respect to the amendment in the upcoming November election.

Because claims under section 203 of the Act are required to be heard by a three-judge district court (with a direct appeal to the Supreme Court), the petitioners applied, pursuant to 28 U.S.C.A. § 2284 (West 1978 & Supp. 1988) and section 204 of the Voting Rights Act, 42 U.S.C.A. § 1973aa-2 (West 1981), for hearing of the cause by a three-judge court. (A47, 50). District Judge James Kehoe denied the application, finding that those statutes did not require a three-judge court in this instance. (A31).

The parties agreed to consolidate the adjudication of the petitioners' requests for preliminary and permanent relief and, after a one-day non-jury trial, Judge Kehoe, on October 24, 1988, rendered a judgment denying the requested relief and dismissing the complaint on the merits. (A42; *see also* A35-41). Petitioners filed a notice of appeal from the judgment to the United States Court of Appeals for the Eleventh Circuit on October 25, 1988, seeking to invoke that court's jurisdiction to review the final judgment of the United States District Court pursuant to 28 U.S.C.A. § 1291 (West 1966 & Supp. 1988) and 28 U.S.C.A. § 1294(1) (West 1966 & Supp. 1988). On October 27, 1988, the court of appeals granted the petitioners' request for expedited disposition in light of

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3. If *either* the signatures collected in counties covered under section 4(f)(4) or the signatures collected in counties subject to section 203 were discounted, the initiative would fail to satisfy the requirements for placement on the ballot.

the impending election and entered an order expediting the appeal, requiring that petitioners file their brief within four days (by October 31, 1988).

The petitioners' brief to the court of appeals pointed out on page 3 in footnote 2 that, upon filing the complaint in the district court, they had "applied, pursuant to 28 U.S.C.A. § 2284 (West 1978 & Supp. 1988) and section 204 of the Voting Rights Act, 42 U.S.C.A. § 1973 aa-2 (West 1981), for hearing of the cause by a three-judge court." The brief further stated explicitly that in rejecting this request, the district court "committed error."[4] The expedited nature of the appeal prevented the petitioners from providing the court of appeals with a fuller discussion of the jurisdictional consequences of Judge Kehoe's refusal to convene a three-judge court.

On November 2, 1988, however, the United States Department of Justice, as amicus curiae, filed a brief in support of the petitioners' position. The Justice De-

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4. The thrust of the petitioners' brief, however, was that the court of appeals should accept jurisdiction over the appeal and reverse the district court's disposition of the merits. As will be shown in the argument below, the petitioners' attempt to invoke the appellate jurisdiction of the court of appeals was not inconsistent with the position here that the Eleventh Circuit was without jurisdiction to affirm the district court's decision. The appeal was necessitated by a lack of clarity regarding the proper appellate remedy when a single district judge denies relief on the merits of a claim which must be heard by a three-judge court. *See generally Ex parte Cogdell*, 342 U.S. 163 (1951). If a three-judge court were not required to hear any of the petitioners' claims, as the trial court concluded, then the only appellate review available to the plaintiffs would have been by appeal to the court of appeals and petition for certiorari to this Court. In order to ensure that some appellate review of the district court's disposition of the case would be available, the petitioners had no alternative but to file the appeal and fully brief the merits to protect themselves against the possibility that their request for a three-judge court would be finally adjudicated against them.

partment's brief, in addition to arguing that the petitioners were entitled to relief on the merits, thoroughly discussed the three-judge court issue, tracing the legislative history of the Voting Rights Act and explaining why a single judge lacked jurisdiction to adjudicate the petitioners' section 203 claim.

On November 3, 1988, a panel of the court of appeals heard argument on the appeal. The following day, the divided panel rendered its decision, affirming the judgment of the district court, with one judge dissenting. (A1). Neither the majority opinion nor the dissent addressed the jurisdictional problem created by Judge Kehoe's decision to adjudicate a claim that could be heard only by three judges. The petitioners' suggestion for rehearing in banc was denied on December 19, 1988. (A45).

REASONS FOR GRANTING THE WRIT

This Court has held that, in the circumstances of the instant case—that is, where a single district judge has erroneously refused to convene a three-judge court and has denied on the merits a claim required to be heard by a three-judge court—a writ of mandamus lies to correct the error. *Stratton v. St. Louis Southwestern Railway Co.*, 282 U.S. 10 (1930).

The Court should issue the requested writ of mandamus, vacating the judgments of the lower courts and remanding to the district court with directions to convene a three-judge court to hear all of the petitioners' claims, because "exceptional circumstances warranting the exercise of the Court's discretionary powers" exist. *See* Sup. Ct. R. 26; *see also Allied Chemical Corp. v.*

Daiflon, Inc., 449 U.S. 33, 35 (1980); *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976); *Will v. United States*, 389 U.S. 90, 95 (1967); *Ex parte Fahey*, 332 U.S. 258, 260 (1947). Moreover, the petitioners "have no other adequate means to attain the relief [they] desire[ ]" and their "'right to issuance of the writ is "clear and indisputable."'" *Allied Chemical*, 449 U.S. at 35 (citations omitted); *Kerr*, 426 U.S. at 403 (citations omitted).

I.

The Petitioners Have a Clear and Indisputable Right to Have a Three-Judge Court Adjudicate Their Claim

In the complaint, the petitioners alleged that the actions of the respondents abridged both sections 203 and 4(f)(4) of the Voting Rights Act. Congress has determined that claims advanced under section 203 must be heard by a three-judge court and an appeal from such a court's judgment must be to this Court. Section 204 of the Act expressly provides that claims brought under section 203 "shall be heard and determined by a court of three judges . . . and any appeal shall be to the Supreme Court." 42 U.S.C.A. § 1973aa-2 (West 1981).

Although section 204 provides for enforcement of section 203(c) only by the Attorney General, the legislative history of section 203(c) clearly indicates that Congress intended also to allow private parties, such as the petitioners in this case, to enforce section 203(c). Six years before the enactment of the language minority provisions in 1975, this Court had held in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), that Congress

intended to create a private right of action to enforce section 5 of the Act, 42 U.S.C.A. § 1973c, despite its failure expressly to authorize private enforcement. 393 U.S. at 554-57. In enacting section 203 and amending section 4 in 1975, Congress affirmed the existence of private enforcement actions, specifically citing *Allen*:

> Title III [containing section 203] authorizes the Attorney General to bring suit against any state or political subdivision which fails or refuses to comply with its prohibitions. Of course, private persons who are injured by the failure or refusal of a state or political subdivision to comply would also have the right to bring suit. *Allen v. State Board of Elections*. . . .

H.R. Rep. No. 196, 94th Cong., 1st Sess. 32 (1975); *see also* S. Rep. No. 295, 94th Cong., 1st Sess., *reprinted in* 1975 U.S. Code Cong. & Admin. News 774, 806-07 & n.40 (referring to the importance of private actions and specifically actions to enforce the rights of Spanish-speaking voters). Accordingly, Congress's clear intention was to permit private enforcement actions to complement federal enforcement of section 203.

This Court has determined that an implied private right of action based on an express right of action for the Attorney General that must be heard by a three-judge court, also must be heard by a three-judge court. *See Allen*, 393 U.S. at 560-63. At issue in *Allen* was section 5 of the Act, which requires covered jurisdictions to preclear changes in voting procedures by obtaining from a three-judge district court in the District of Columbia a declaratory judgment that the change does not have a racially discriminatory purpose or effect.

See 42 U.S.C.A. § 1973c (West 1981).[5] The provision states that any action thereunder—a preclearance action —must be heard by a three-judge court. *Id.*

The *Allen* Court implied a private right of action to enjoin covered jurisdictions from implementing voting changes that have not been precleared, and concluded that such an action must also be heard by a three-judge court. 393 U.S. at 554-63. The Court held that Congress had required three-judge court review in section 5 to provide additional protection to states whose electoral procedures were being significantly disrupted by the preclearance process. *Id.* at 562-63. The Court further held that a private action, filed to require a jurisdiction to submit a voting change for a preclearance determination, sufficiently disrupted state electoral procedures to infer that Congress would have wanted such actions heard by three-judge courts. *Id.* As the Court reasoned, "[a]lthough a suit brought by the individual citizen may not involve the same federal-state confrontation, the potential for disruption of state election procedures remains." *Id.* at 563. Accordingly, the Court mandated the empanelment of a three-judge court to hear private citizens' claims brought under section 5 of the Voting Rights Act.

The same reasoning compels the conclusion that a private action under section 203 of the Act must, like an action brought by the Attorney General pursuant to that section, be heard by a three-judge district court

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5. As the *Allen* Court recognized, Congress provided an express right of action under section 5 for both the Attorney General and covered jurisdictions. *See Allen*, 393 U.S. at 554-61; *see also* 42 U.S.C.A. § 1973c (West 1981); 42 U.S.C.A. § 1973j(d) (West 1981).

with a direct appeal to this Court.[6] In the instant case, however, the courts below failed to heed the congressional dictate that three-judge court review be afforded for all claims brought under section 203. The single district judge declined to convene the required three-judge court and denied both the section 4(f)(4) and section 203(c) claims on the merits.[7] The Eleventh Circuit, ignoring the jurisdictional problem posed by the district judge's refusal to convene the three-judge court and his denial on the merits of the claims, affirmed the decision of the district court. Under these circumstances, the petitioners' right to the issuance of the writ of mandamus is "clear and indisputable." *See Allied Chemical*, 449 U.S. at 35; *Kerr*, 426 U.S. at 402.

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6. The petitioners' inclusion in the complaint of a claim under section 4(f)(4) of the Act—which ostensibly need not be heard by a three-judge court—did not dispense with the need for a three-judge court. *See Zemel v. Rusk*, 381 U.S. 1, 5-6 (1965).

Moreover, a three-judge district court unquestionably could decide both of the claims advanced by the petitioners. Pendent one-judge claims that arise from a common nucleus of operative fact as a three-judge claim properly are within the jurisdiction of a three-judge court. *See City of Rome v. United States*, 472 F. Supp. 221, 236 (D.D.C. 1979), *aff'd*, 446 U.S. 156 (1980) (finding jurisdiction to decide constitutional claims that did not have an independent three-judge jurisdictional base and section 5 Voting Rights Act claim); *see also Clayton v. North Carolina State Bd. of Elections*, 317 F. Supp. 915, 919-20 (E.D.N.C. 1970) (holding that "[h]aving jurisdiction as a three-judge court of at least part of the controversy, we conclude that we may exercise jurisdiction over the remainder of the controversy under the doctrine of pendent jurisdiction"); *cf. Alexander v. Fioto*, 430 U.S. 634, 636 (1977) (reviewing three-judge district court decision that could be read as resting on grounds that were not required to be heard by a three-judge court); *Brotherhood of Locomotive Engineers v. Chicago, R.I. & P. R.R.*, 382 U.S. 423, 428 (1966) (same).

7. In *Hagans v. Lavine*, 415 U.S. 528 (1974), this Court held that it is a preferred practice for a single district judge,

(Continued on following page)

II.

Mandamus is the Exclusive Remedy Available to the Petitioners

The requested writ of mandamus should issue because, as this Court has consistently recognized, the petitioners "have no other adequate means to attain the relief [they] desire[ ]." *Allied Chemical*, 449 U.S. at

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Footnote continued—

when presented with both claims that must be heard by a three-judge court and claims that need not be, to resolve the latter before convening the three-judge court. *Id.* at 543-44; *see also Philbrook v. Glodgett*, 421 U.S. 707, 712 n.8 (1975). *Hagans* further holds, however, that "if a single judge rejects the [single-judge] claim, a three-judge court must be called to consider the [three-judge claim]." 415 U.S. at 544. If the three-judge court then disposes of the claim adversely to the plaintiff, a final judgment encompassing all claims must be entered and the plaintiffs may take a direct appeal to this Court.

The practice outlined in *Hagans* was not followed in this case. The trial judge simply disposed of all claims, including the section 203(c) claim which must be heard by a three-judge court. Moreover, the practice of reaching potentially dispositive single-judge claims first, which is generally meant to assure that a three-judge court is not convened unnecessarily, would have been inappropriate in the circumstances of this case because the claims under sections 4(f)(4) and 203 are substantively identical. The early disposition of the one-judge claim adverse to the petitioners would create the unseemly possibility that the required three-judge court would render an inconsistent verdict on the substantively identical claim that is subject to its consideration. The single judge's decision could not, in fact, preclude the three-judge court from reaching a different result because his decision would, at most, establish the law of the case. *See Arizona v. California*, 460 U.S. 605, 619 (1983). Even if a single judge's decision of the section 4(f)(4) claim were regarded as preclusive of an inconsistent, subsequent three-judge disposition of the section 203 claim, only a three-judge court appropriately could make that determination. In that event, the single judge's early decision would foreclose a three-judge court decision on the precise issue that Congress has said must be decided by a three-judge court, without eliminating the need to convene a three-judge court and the right of direct appeal to this Court.

35; *Kerr*, 426 U.S. at 403. This Court has held that, where a district court erroneously fails to convene a three-judge court and denies the claim on the merits, the only remedy is a writ of mandamus from this Court directing the district judge to convene the required three-judge court. *See Ex parte Northern Pacific Railway Co.*, 280 U.S. 142 (1929) (granting petition for writ of mandamus without issuing formal writ); *see also Ex parte Bransford*, 310 U.S. 354 (1940); *Ex parte Atlantic Coast Railroad Co.*, 279 U.S. 822 (1929).[8] No appeal lies to this Court because the decision is not a judgment of a three-judge district court, and no appeal is available in the court of appeals because such an appeal would defeat the purpose of the statute giving a right to direct appellate review in the Supreme Court. *Stratton v. St. Louis Southwestern Railway Co.*, 282 U.S. 10, 16 (1930) (interpreting the three-judge court and direct Supreme Court appeal requirement of 28 U.S.C.A. §§ 1253, 2281 & 2284). As Chief Justice Hughes explained in *Stratton*:

> If a single judge, thus acting without jurisdiction, undertakes to enter an order granting an interloc-

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8. A single district judge may dismiss an action where it is apparent from the face of the complaint that the claim of federal jurisdiction, and thereby the right to three-judge adjudication, is patently frivolous. *See Ex parte Poresky*, 290 U.S. 30, 32 (1933); *see also Washington v. Confederated Tribes*, 447 U.S. 134, 146 (1980); *Goosby v. Osser*, 409 U.S. 512, 518 (1973); *Schneider v. Rusk*, 372 U.S. 224 (1963); *Bailey v. Patterson*, 369 U.S. 31 (1962). An appeal from such a decision lies only to the court of appeals. *See Schneider*, 372 U.S. at 225; *Bell v. Waterfront Comm'n of New York Harbor*, 279 F.2d 853 (2d Cir. 1960).

The single district judge below did not base his denial of petitioners' application for a three-judge court on a determination that the claim under section 203 was frivolous. Moreover, the substantiality of the federal claim raised by the petitioners under section 203 has never been in dispute.

> utory injunction or a final decree, either dismissing the bill on the merits or granting a permanent injunction, no appeal lies from such an order or decree to this court, as the statute plainly contemplates such a direct appeal only in the case of an order or decree entered by a court composed of three judges in accordance with the statutory requirement. Nor does an appeal lie to the Circuit Court of Appeals from an order or decree thus entered by a District Judge without authority, *for to sustain a review upon such an appeal would defeat the purpose of the statute by substituting a decree by a single judge and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this court.*

282 U.S. at 15-16 (emphasis added); *see also German v. South Carolina State Ports Authority*, 295 F.2d 491 (4th Cir. 1961) (discussing *Stratton* in dicta).

This Court has thus recognized that the court of appeals lacks jurisdiction to take any action other than to advise the district court of its error. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962) (remanding to district court); *Stratton*, 282 U.S. at 18.

Notwithstanding these decisions, there exists uncertainty regarding the appropriate remedy where a single district judge disposes of the merits of a claim that must be heard by a court of three judges. This Court's opinion in *Idlewild* is frequently discussed as creating doubt as to the continued validity of the *Stratton* principles. *Idlewild* has been cited for the proposition that courts of appeals in fact have jurisdiction to review single-judge decisions denying on the merits claims that must be heard

by three-judge courts.[9] Close analysis of *Idlewild* and subsequent decisions of this Court interpreting *Idlewild*, however, shows that "[t]hese decisions establish no more than that appeal does not lie to the Supreme Court." 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*: *Jurisdiction 2d* § 4040, at 140 n.15 (2d ed. 1988). This Court has never held that appellate review on the merits, as was provided by the Eleventh Circuit in this case, in fact is available in the court of appeals if the claim at issue was required to be heard by a three-judge court. Indeed, this Court's decisions expressly hold to the contrary.

The plaintiff in *Idlewild* brought an action in the Southern District of New York and requested a three-judge court pursuant to 28 U.S.C.A. § 2281 (repealed 1976) and 28 U.S.C.A. § 2284 (West 1978 & Supp. 1988). The district judge denied the request and retained jurisdiction of the case, but abstained from deciding it to

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9. *See, e.g., Stamler v. Willis*, 371 F.2d 413, 414-15 (7th Cir. 1966) (remanding with directions to grant request for three-judge court); *Lion Mfg. Corp. v. Kennedy*, 330 F.2d 833, 840-41 & n.14 (D.C. Cir. 1964) (finding that "[t]he availability in the Court of Appeals of direct review of [dismissal of complaint] by a single judge has, after some period of uncertainty, now been solidly established" by *Idlewild*); *Ammex Warehouse Co. v. Department of Alcoholic Beverage Control*, 224 F. Supp. 546, 556 (S.D. Cal. 1963) (reading *Idlewild* decision as advising the district court "that in substance, its judgment was reversed" by the court of appeals), *aff'd*, 378 U.S. 124 (1964); *see also Calloway v. Briggs*, 443 F.2d 296 (6th Cir. 1971) (concluding that district court had erred in refusing to convene a three-judge court and dismissing the action on the merits, appellate court vacated decision of the district court and remanded case for invocation of a three-judge court); *cf. Aaron v. Cooper*, 261 F.2d 97 (8th Cir. 1958); *see generally*, 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*: *Jurisdiction 2d* § 4040, at 145 n.26 (2d ed. 1988) (noting that "modern cases establish that the court of appeals has power to direct that a three-judge court be convened").

give the state courts an opportunity to pass on the constitutional issues presented. The plaintiff appealed to the United States Court of Appeals for the Second Circuit. The Second Circuit dismissed the appeal, holding that "it was powerless to take formal corrective action" in light of *Stratton*, although it unambiguously stated in its opinion that " 'a three-judge district court should have been convened.' " 370 U.S. at 714 (quoting opinion of Second Circuit, 289 F.2d 426 (2d Cir. 1961), *remanded*, 370 U.S. 713 (1962)). The plaintiff then renewed in the district court its request for a three-judge court, relying on the Second Circuit's opinion. The district court once again declined to convene a three-judge court, however, on the ground that the previous ruling of the district court had established the law of the case and that the opinion of the court of appeals that a three-judge court should have been appointed was "merely a 'dictum.' " *Id.* at 715 (quoting opinion of district court).

The *Idlewild* plaintiff then sought review by this Court, filing both a petition for writ of certiorari to the court of appeals and a petition for writ of mandamus to the district court. This Court opined that the Second Circuit had correctly decided that a three-judge court should have been convened and went on to say that the opinion of the Second Circuit "should have been followed" by the district court, notwithstanding that the Second Circuit lacked jurisdiction to review the merits of the appeal. *Id.* at 716.

The Court in *Idlewild* did not hold that the Second Circuit had jurisdiction over the merits of the appeal, or that the district court was required by the Second Circuit's opinion to convene a three-judge court. Rather, it held only that, where the Second Circuit had expressed

an opinion regarding the three-judge court issue, the district court should follow that opinion, even though it appeared only in the context of an order declining to exercise jurisdiction. The Court explained:

> In the Stratton Case it was held that a court of appeals was precluded from reviewing on the merits a case which should have originally been determined by a court of three judges. Stratton does not stand for the broad proposition that a court of appeals is powerless ever to give any guidance when a single judge has erroneously invaded the province of a three-judge court.

Id. at 715-16.

Notwithstanding that *Idlewild* left the *Stratton* rule intact, a number of subsequent decisions of this Court have stated, in dicta, that appeals from orders that refuse to convene a three-judge court can be taken to the courts of appeals. However, none of those decisions expressly overrules the plain holding of *Stratton* that the courts of appeals have no jurisdiction over the merits of such appeals. Each such decision can be read as holding only that, because no three-judge court was convened, an *appeal* to the Supreme Court does not lie. Dicta in this Court's decisions regarding the availability of appellate review in the court of appeals must be interpreted as meaning only that appellate review of the merits *may* lie in the court of appeals, but that the availability of such an appellate remedy is dependent upon the propriety of the district judge's refusal to convene a three-judge court.

For example, in *McLucas v. De Champlain*, 421 U.S. 21 (1975), the Court stated: "[W]e have held that, when

a single district judge fails to call for the convention of a three-judge court and goes on to dispose of the case, an appeal lies only to the court of appeals." *Id.* at 30 (citing *Idlewild*). To follow *Stratton* and *Idlewild*, a court of appeals receiving such an appeal and concluding that a three-judge court should have been convened would have the power to express an opinion regarding the impropriety of the district court's ruling on the three-judge court issue.[10] It would not, however, have jurisdiction to reverse the decision below or to direct any further proceedings. On the other hand, if the court of appeals, either correctly or incorrectly, upheld the district judge's three-judge court denial, it would be required to dispose of the merits of the appeal. If this Court then held that the court of appeals improperly exercised jurisdiction over the appeal, it would be apparent that no appellate remedy was available in the court of appeals.

In *Hicks v. Pleasure House, Inc.*, 404 U.S. 1 (1971), a case relied on by the Court in *McLucas*, the Court went so far as to opine, again in dicta, that "if a single judge oversteps his limited authority under §2284(3), a court of appeals may correct his error." 404 U.S. at 3. But the case does not hold that the court of appeals in fact had jurisdiction to review the decision of the single judge declining to convene the three-judge court. The only corrective action which would be permissible was the corrective action taken by the jurisdictionless Second Circuit in *Idlewild*—dismissal of the appeal for want of

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10. A court always has power, and indeed is required, to assess whether it has jurisdiction over an appeal. *See generally* 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3522, at 70-72 (2d ed. 1984).

jurisdiction and expression of an opinion regarding the action below.[11]

Decisions such as *McLucas* and *Hicks* have led commentators to conclude that this Court has retreated from *Stratton* and that an appeal of a single judge's refusal to convene a three-judge court and his or her disposition of the merits lies only to the courts of appeals.[12] That conclusion is not, however, necessitated by this Court's opinions; neither should it be embraced by this Court. The teaching of Chief Justice Hughes in *Stratton*, a decision that has been cited and relied upon by this Court as recently as 1986, *see Bender v. Williamsport Area School District*, 475 U.S. 534, 106 S.Ct. 1326, 1331 n.4 (1986), remains as true today as when written: "[T]o

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11. *See also Mengelkoch v. Industrial Welfare Comm'n*, 393 U.S. 83 (1968) (per curiam) (stating in dicta that an appeal lies to the appropriate court of appeals when a three-judge court dissolves itself for want of jurisdiction); *Wilson v. City of Port Lavaca*, 391 U.S. 352, 352 (1968) (per curiam) (stating in dicta that "when a single judge declines to convene a three-judge court and denies relief[,] an appeal lies to the appropriate United States Court of Appeals"); *Schackman v. Arnebergh*, 387 U.S. 427 (1967) (per curiam) (citing *Idlewild* in dicta for the proposition that review of a district court's refusal to convene a three-judge court is available in the court of appeals); *accord Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 100 n.19 (1974) (stating in dicta that interlocutory review of single judge's refusal to convene three-judge court lies in the court of appeals either through a petition for writ of mandamus or through a certified interlocutory appeal).

12. *See* 12 J. Moore, H. Bendix & B. Ringle, *Moore's Federal Practice* ¶ 421.03[7] (2d ed. 1980); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 91 & n.91 (6th ed. 1986) (citing American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 54, 331-34 (1969)); 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 4040, at 144 n.25 (2d ed. 1988); Note, *The Three-Judge District Court: Scope and Procedure Under Section 2281*, 77 Harv. L. Rev. 299, 304-06 (1963).

sustain a review upon such an appeal would defeat the purpose of the statute by substituting a decree by a single judge and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this court." *Stratton*, 282 U.S. at 16. Congress has decided that three-judge courts must hear certain claims and that this Court must review those decisions on direct appeal.[13] Any procedure that would undermine that scheme unconstitutionally invades the province of Congress.

Turning to the instant case, it is apparent that the decision of the single district judge, denying the request for a three-judge court and denying relief on the merits, as well as the Eleventh Circuit's affirmance of those decisions, directly contravene the holdings of *Stratton*, *Idlewild* and the cases cited above which adhere to those decisions. "The single-judge District Court was . . . powerless to dismiss the action on the merits, and should have convened a three-judge court." *Schneider*, 372 U.S. at 225. The single district judge's refusal to convene a three-judge court should have precluded the court of appeals from affirming the district court's decision. The court of appeals had no jurisdiction over the appeal and, therefore, was without power to do anything other than that which the Second Circuit did in *Idlewild*: offer guidance regarding the propriety of the decision to refuse to convene a three-judge district court. Mandamus is, then, as this Court has consistently recognized, the only remedy available to the petitioners.

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13. The issuance of the requested writ of mandamus would, then, "be in aid of the Court's appellate jurisdiction." Sup. Ct. R. 26.

III.

Exceptional Circumstances Warrant the Exercise of this Court's Discretionary Powers

Through the litigation underlying this petition for writ of mandamus, the petitioners have sought a determination of whether the language minority provisions of the Voting Rights Act apply to petitions to amend state constitutions. Many states now authorize their citizens to initiate public votes on amendments to their constitutions by gathering signatures on petitions. In recent years, this method of self-government has become increasingly popular and has led to public votes on numerous state constitutional amendments dealing with a wide array of topics.[14] The "Official English Amendment" at issue in this case has been, and continues to be, the subject of petition drives in many states.[15]

The question of whether petitions to amend state constitutions are subject to the language minority provisions of the Act is one of critical importance to language minorities not only in Florida, but across the country. A decision on the issue by this Court could safeguard such

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14. *See, e.g., In California, They're Voting on Nearly Everything,* BusinessWeek, Oct. 31, 1988, at 30 (reporting that 29 initiatives had been placed on the California ballot and that more than $100 million would be spent promoting or fighting the initiatives); *Just Say 'No' - Or 'Yes',* Newsweek, Nov. 7, 1988, at 63 (reporting on the more than 200 referenda and initiatives on the November, 1988 ballot in 41 states); *Review and Preview,* Barron's, Nov. 7, 1988, at 5, col. 3 (reporting that "on ballots across the country are a host of constitutional amendments, referendums and initiatives concerning everything from car insurance to the rights of privacy of AIDS victims to abortion to closing nuclear power plants") (emphasis omitted).

15. *See* Guerra, *Voting Rights and the Constitution: The Disenfranchisement of Non-English Speaking Citizens,* 97 Yale L.J. 1418, 1418 (1988); Note, *"Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States,* 100 Harv. L. Rev. 1345, 1345-47 (1987).

minorities from direct attacks such as that launched by supporters of Official English[16] and from more subtle efforts to diminish their rights through the use of the petition process.[17] It also could ensure that this country's growing language minority population can fully participate in a newly vital process through which fundamental political change is effected.

Congress has determined that the critical question—raised under section 203 of the Act—must be answered in the first instance by a three-judge district court, and that a direct appeal of the three-judge court's decision lies to this Court. By that mandate, Congress has sought to ensure that claims under section 203 receive swift and certain review by this Court. Congress's mandate has, however, been undermined in the instant case by the refusal of the single district judge to convene a three-judge court and his denial on the merits of the petitioners' claims. The action of the single district judge below served not only to prevent the adjudication of the section 203 claim by the required three-judge court, but also, to block this Court's direct review of the merits of a question of great importance. Mandamus is the only remedy available to the petitioners to vindicate their clear legal right to adjudication of their claim by a three-judge court and their right to review of the merits of their claim by this Court.

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16. One commentator has observed: "By its own account, the 'official English' movement seeks to stimulate debate on the sensitive issue of language and to promote social unity through a common tongue. In fact, however, the movement makes language the rallying point for simmering intolerance, frustration, fear, and distrust." Note, *supra* note 15, at 1362.

17. *See* Hodgkiss, *Petitioning and the Empowerment Theory of Practice*, 96 Yale L.J. 569, 574 (1987) (pointing out that the right to petition is effectively denied, and therefore oppressive, to those who have limited financial means).

CONCLUSION

This Court should issue the writ of mandamus, vacating the judgments below and remanding the case to the district court with directions to convene a three-judge court to decide all of the petitioners' claims.[18]

Respectfully submitted,

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18. Because the district judge lacked jurisdiction to dispose of all of the claims in the case, his disposition of the section 4(f)(4) claim was merely an interlocutory order which was not properly appealable to the court of appeals under 28 U.S.C.A. § 1291 (West 1966 & Supp. 1988). Therefore, this Court should vacate not only the court of appeals' affirmance of the district court's dismissal of the section 203(c) claim, but also its affirmance of the dismissal of the section 4(f)(4) claim, irrespective of whether that claim may, in the circumstances of this case, be heard by a single judge.